PUBLIC PROSECUTOR

v.

LOW KOK WAI

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL TRIAL NO. 58-10-86]
25 JANUARY 1988

CRIMINAL LAW: *Mitigation - Plea of guilty - Section 39B of Dangerous Drugs Act 1952 - Offence committed before April 1983 - Exceptional circumstances.*

The accused was charged under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952. He claimed trial and after four prosecution witnesses have given evidence he changed his plea to one of guilty. The only mitigating factor is the accused's plea of guilty. It was shown that the accused had travelled to Thailand and Singapore several times and he has in his possession airline tickets for Penang/Singapore/Frankfurt.

Held:

[1] As the offence was committed before April 1983 the law gave the judge a discretion as to sentence i.e. either death or imprisonment for life and whipping.

[2] Other than in the most exceptional circumstances a sentence of death should be imposed to show the gravity of the offence.

[3] The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused.

[4] The accused was accordingly sentenced to death by hanging.

Case referred to:
R. v. Davis [1980] 2 Cr App R (S) 168

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B

Other source referred to:
Archbald, 42nd Edn., para. 4-480

For the public prosecutor - Josephine Sivaretnam
For the accused - R. Rajasingam; M/s. Rajasingam & Co.

JUDGMENT

Mohamed Dzaiddin J:

The accused was charged before me as follows:

> That you on 12 August 1982 at about 5.55 p.m. at the International Airport, Bayan Lepas in the District of Balik Pulau, in the State of Penang, did on your own behalf traffic in a dangerous drug, to wit heroin weighing 1979.3 grammes and that you have thereby committed an offence under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39(B)(2) of the same Act.

He claimed trial to the charge. However, after four prosecution witnesses have given evidence, the accused through his Counsel, Mr. Rajasingam, informed me that he would like to change his plea to one of guilty. I then ascertained through the Chinese interpreter whether he understood the consequences of his change of plea. He replied "yes". After considering the prosecution evidence thus far, I was satisfied that the accused knew the consequences of his plea of guilty. The learned Deputy Public Prosecutor then submitted the brief facts of the prosecution case which he also admitted. Hence, under the above circumstances I found the accused guilty as charged and I convicted him.

On 22 January 1988 I heard submissions from Counsel and the Deputy Public Prosecutor on mitigation of sentence. The accused was 22 years 11 months old at the time of the arrest. He is the eldest in a family of five and before the arrest he was a construction worker. He is a first offender. His international Malaysian passport, (P2) showed that he had travelled to Thailand and Singapore on a few occasions in 1981 and 1982 and at the material time of his arrest he was making his first visit to Europe i.e. to Insbruck, Austria. He was in possession of airline tickets for Penang/Singapore/ Frankfurt and Frankfurt/Insbruck return. He had also cash of US$1,000.

From the evidence, I am satisfied that at the time of his arrest the accused was carrying a substantial amount of heroin i.e. 1979.3 grammes concealed underneath a well-packed travelling bag. I concede that he was a courier, but it is evident from the airline tickets and his personality that he was part of an international syndicate dealing in drugs from Malaysia for European destinations. In the circumstances of this case, I must reject defence submission that the accused was a "victim of circumstances" in that he was lured to go to Austria looking for a job and carrying a luggage not knowing its content. I am equally satisfied that he knew what he was carrying and that the accused had custody and control of the drug in the baggage at the time of his arrest.

As the accused committed this offence before April 1983, the law then gave me a discretion to sentence him on conviction with either death or imprisonment for life and whipping. Certain guideline is laid down by the then Federal Court on sentencing. The gist is that other than in the most exceptional circumstances, a sentence of death should be imposed to show the gravity of the offence, public disapproval, to punish the offender and most of all to protect the public. In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the Court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused. (See: *Archbald*, 42nd Edn. para. 4-480 citing *R. v. Davis* [1980] 2 Cr App R (S) 168.) In the present case, I accept the accused's change of plea to be a mitigating factor. However, bearing in mind his *modus operandi*; the concealment of the drug in his travelling bag which was professionally done; its substantial weight; and that there would be no effective defence to the charge had the accused not pleaded guilty; in my judgment, the effect of his plea of guilty would not be a powerful mitigating factor. Further, these factors cannot constitute what the Federal Court has termed as "the most exceptional circumstances." For these reasons, I sentence the accused to death by hanging.

Also found at [1988] 2 CLJ 105